

**Jae K. Lee and Dang H. Song, a partnership d/b/a  
Travelodge San Francisco Civic Center and  
Steven L. Smith, Case 20-CA-14223**

July 2, 1981

### **SUPPLEMENTAL DECISION AND ORDER**

On May 16, 1979, the National Labor Relations Board issued a Decision and Order<sup>1</sup> in the above-entitled proceeding in which the Board, *inter alia*, ordered Respondent to make whole Steven L. Smith for any loss of earnings suffered by reason of Respondent's discrimination against him. On August 6, 1980, the United States Court of Appeals for the Ninth Circuit entered its judgment enforcing the Board's Order. A controversy having arisen over the amount of backpay due under the Board's Order, as enforced by the court, the Acting Regional Director for Region 20, on February 5, 1981, issued and duly served on Respondent a backpay specification and notice of hearing, alleging the amount of backpay due the discriminatee under the Board's Order and notifying Respondent that it should file a timely answer complying with the Board's Rules and Regulations, Series 8, as amended. Respondent failed to file an answer to the specification.

Thereafter, on March 23, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, with appendices attached. Subsequently, on March 26, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent failed to file a response to the Notice To Show Cause, and the allegations of the Motion for Summary Judgment stand uncontroverted.

Upon the entire record in this proceeding, the Board makes the following:

#### **Ruling on the Motion for Summary Judgment**

Section 102.54 of the Board's Rules and Regulations, Series 8, as amended, provides, in pertinent part, as follows:

(a) . . . The respondent shall, within 15 days from the service of the specification, if any, file an answer thereto . . . .

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(c) . . . If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may,

either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. . . .

The backpay specification, issued on February 5, 1981, and served on Respondent on February 6, 1981, specifically states that Respondent shall, within 15 days from the date of the specification, file with the Regional Director for Region 20 an answer to the specification and that, if the answer fails to deny the allegations of the specification in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true and Respondent shall be precluded from introducing any evidence controverting them.

According to the uncontroverted allegations of the Motion for Summary Judgment, after the time for filing an answer had expired, counsel for the General Counsel, by letter dated March 3, 1981, advised Respondent that an answer had not been received, and that if the answer was not received by the Regional Office in a timely fashion, the Region would promptly move for summary judgment. As of March 20, 1981, the date of the Motion for Summary Judgment, Respondent had filed no answer to the specification, and to date has not indicated that it would file an answer. Respondent has also failed to file a response to the Notice To Show Cause and, therefore, the allegations of the Motion for Summary Judgment stand uncontroverted. As Respondent has not filed an answer to the specification and has not offered any explanation for its failure to do so, in accordance with the rules set forth above, the allegations of the specification are deemed to be admitted as true and are so found by the Board, without the taking of evidence.

Accordingly, on the basis of the allegations of the specification which are accepted as true, the Board concludes that the net backpay due the discriminatee, Steven L. Smith, is as stated in the computations of the specification, and orders the payment thereof be made by Respondent to the discriminatee.

### **ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Jae K. Lee and Dang H. Song, a partnership d/b/a Travelodge San Francisco Civic Center, San Fran-

<sup>1</sup> 242 NLRB 287.

cisco, California, its officers, agents, successors, and assigns, shall:

1. Make whole the discriminatee named below by payment to him of the amount following his name, plus interest thereon, until payment of all backpay due is made, less tax withholdings required by Federal and state laws:

Steven L. Smith	\$11,406.20
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2. Make whole the discriminatee listed below by payment to his account with Hotel and Restaurant Employees and Bartenders Union, Local 2, Hotel

and Restaurant Employees and Bartenders International Union, AFL-CIO, contractual pension fund the amount set forth opposite his name:<sup>2</sup>

Steven L. Smith	\$708.06
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<sup>2</sup> Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make whole" remedy. We therefore leave to further proceedings the question of how much interest Respondent must pay into the benefit fund in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative cost, etc., but not collateral losses. See *Merriweather Optical Company*, 240 NLRB 1213, 1216 at fn. 7 (1979).